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May 24, 2004

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002

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MAY 24 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re. Texas Education Telecommunication Network Appeal of Decision
of Universal Service Administrator, CC Docket No. 02-6

Dear Ms. Dortch:

Enclosed please find the appeal of this firm's client Texas Education Telecommunication Network in the matter referenced above. Please stamp the enclosed copy of the document and return it to the courier delivering this letter.

Very truly yours,

Bracewell & Patterson, L.L.P.

George M. Foote

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Enclosure

**Before the
Federal Communications Commission
Washington, DC**

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In the Matter of:)	MAY 24 2004
)	FEDERAL COMMUNICATIONS COMMISSION
Request for Review by)	OFFICE OF THE SECRETARY
Texas Education Telecommunication)	FCC Forms 471 and 486
Network)	Application No. 330978
)	FRN Nos. 895094 and 895095
of Decision of)	Billed Entity No. 194076
)	
Universal Service Administrator)	CC Docket No 02-6

Appeal of Administrator's Determination of Service Start Date

In accordance with the provisions of 47 C F R. § 54.722, the Texas Education Telecommunication Network ("TETN") appeals the March 30, 2004 decision of the Administrator of the Universal Service Administrative Company ("Administrator") in the above-referenced matter. TETN seeks the order of the Commission that the 120-day period in which to file Form 486 for Application Number 330978 began on September 12, 2003 rather than May 5, 2003 as determined by the Administrator.

Factual Background

TETN is a statewide telecommunications network in Texas that connects 20 intermediate education centers and their respective school networks. Pursuant to the terms provided by 47 C F R., Part 54, TETN timely applied to the Schools and Libraries Division ("SLD") of the

Universal Service Administrative Company for telecommunication service discounts for Year 2002 on SLD Form 471. The application was assigned application number 330978, and the TETN funding requests were assigned Funding Request Numbers ("FRN") 895094 and 895095.

SLD issued a funding commitment decision letter ("FCDL") on May 5, 2003 for FRNs 895094 and 895095. See Exhibit A. TETN was disappointed to learn that an SLD audit had resulted in the reduction of the funding amount to approximately 67% of the total eligible funding.

On June 19, 2003, well within both the 120-day period allowed for filing Form 486 to accept the reduced funding levels and the 60-day period for appealing the reduced funding, Ms. Carol Willis, TETN Manager, received a telephone call from Tom Celentano, a SLD Program Integrity Assurance Team auditor. For approximately one year Mr. Celentano had worked with TETN issues for SLD and had directed various filings by TETN. See affidavit of Carol Willis, attached as Exhibit B, (hereinafter "*Willis Affidavit*").

In his call, Mr. Celentano informed Ms. Willis that SLD had conducted "internal discussions" about the funding for statewide backbone networks like TETN. As a result, according to Mr. Celentano, SLD had changed its funding decision for TETN: instead of the 67% funding level approved in the May 5, 2003 FCDL, SLD would fully fund TETN's application. Mr. Celentano instructed TETN to "do nothing" but wait for the new FCDL. Accordingly, TETN waited. *Willis Affidavit*

On August 7, 2003, having heard nothing further, Ms. Willis called Mr. Celentano to inquire into the status of the new FCDL. Later that day, Mr. Celentano returned the call to Ms. Willis and informed her that the FCDL had not been sent. He told her, however, that the letter was "based upon an appeal" and repeated his instruction that she should do nothing until TETN

received "the new funding commitment letter." Ms. Willis was surprised at the news about an "appeal" since TETN, relying on Mr. Celentano's earlier instruction and assurance that the request would be fully funded, had not filed an appeal. *Willis Affidavit.*

On September 15, 2003, still having heard nothing from SLD about the new funding commitment letter, Ms. Willis called Mr. Celentano again for information and expressed her concern about the delay in notification of the new funding. Again, Mr. Celentano instructed Ms. Willis to take no action, but rather to wait until TETN received the new funding commitment letter. Mr. Celentano assured Ms. Willis that the 120-day filing period for the May 5, 2003 letter did not apply, that she should not worry about missing that deadline and that she should "wait until you receive the new letter." *Willis Affidavit.*

In a letter dated September 12, 2003, and received by TETN on September 17, 2003, SLD issued an "Appeal Funding Commitment Letter" for the total eligible amount, as Mr. Celentano had reported would occur. See Exhibit C. TETN was gratified to receive full funding of its requests. Mysteriously, the letter began: "As you know from our previous letter reporting the Administrator's Decision on Appeal" TETN had not filed an appeal nor received a previous letter referring to a decision on an appeal. *Willis Affidavit.*

On October 9, 2003 Ms. Willis electronically submitted Form 486 to SLD to accept the funds

On October 22, 2003, SLD issued to TETN a Form 486 Notification Letter, Form 486 Application Number 245005. See Exhibit D. TETN was surprised to see that SLD had changed the Service Start Date from the anticipated July 1, 2002, to June 11, 2003. SLD determined the new Service Start Date by reference to the date of the funding commitment letter that had been issued on May 5, 2003. That reference, of course, meant that the TETN Form 486 was filed

more than 120 days after the date of the FCDL, which in turn resulted in establishment of a Service Start Date on the day 120 days before the filing of the Form 486. That date was determined to be June 11, 2003.

The arithmetic was right, but the premise was wrong. TETN did *not* file its Form 486 with respect to the May 5, 2003 FCDL. Rather, following the directions of Mr. Celentano, TETN filed the Form 486 within the 120-day window following the "Appeal Funding Commitment Letter" of September 12, 2003.

On October 22, 2003, immediately upon receipt of the SLD Form 486 Notification Letter containing the changed Service Start Date, TETN appealed the change to the Administrator. See Exhibit E. Based upon its reliance on Mr. Celentano's instructions, TETN requested the 120-day deadline be calculated with reference to the date of the "Appeal Funding Commitment Letter" of September 12, 2003. The result of such calculation would be to ensure a service start date of July 1, 2002. In its appeal, TETN explained the instructions it had received from SLD's Mr. Celentano.

On March 30, 2004, SLD denied the TETN appeal. See Exhibit F. SLD wrote:

After thorough review and investigation of all relevant facts, the SLD determined that Texas Education Telecommunications Network should have filed their Form 486 for this funding request within 120 days calculated from either the date of their original Funding Commitment Decision Letter or the Service Start Date as indicated on the Form 486, whichever is later.

The Administrator ruled that the May 5, 2003 funding commitment letter started the 120-day clock for filing the Form 486. The Administrator did not refer to the information and instructions provided to TETN by Mr. Celentano. The Administrator did not explain the "appeal" that TETN learned about only through Mr. Celentano.

Discussion

The Commission should overturn the Administrator's decision and restore the July 1, 2002 service start date for TETN's Application Number 330978 for two reasons:

First, fair treatment of applicants and efficient operation of the program requires that applicants not be penalized for following specific direction of SLD employees.

Second, even where the Administrator may find a technically accurate basis for calculating a service start date based on the first of two separate funding determinations for a single application, if circumstances particular to the case have reasonably caused the applicant to withhold filing of Form 486 until receipt of the second funding determination, the Commission should exercise its discretion to permit a more reasonable service start date.

1 Applicants Should be Able to Rely on Specific Instruction from SLD Employees

TETN and other applicants not only should be entitled to rely on SLD directions, but they should be required to do so. It would be unfortunate precedent for SLD and would cause great confusion in its programs if applicants were not required to follow the specific directions of SLD employees

This case illustrates the confusion that might otherwise result. When Mr. Celentano called TETN to report that its request would be fully, rather than partially funded, he appropriately directed TETN to do nothing. Mr. Celentano's instructions and TETN's compliance with the instructions provided the most efficient result for SLD and for TETN. At the time of Mr. Celentano's call, TETN was within both the 120 day period to file the Form 486 without penalty and within the SLD's 60 day period for an appeal of the partial funding commitment, so it had all options available to it. If TETN had filed the Form 486 for the partial funding amount granted by the May 5, 2003 funding letter after hearing from Mr. Celentano, it

would have accepted payment of an amount that TETN already knew had been changed. The result would have been administrative confusion and waste of resources to change or supplement the amount later. Similarly, if TETN had appealed the partial funding after hearing from Mr. Celentano, it would have been in the unusual position of appealing after it had already been told that it "won" the appeal. Again, the result would have been confusion and wasted resources at SLD.

Before receiving the May 5, 2003 FCDL, TETN had dealt with Mr. Celentano for almost a year. Because strict compliance with SLD directives is crucial to obtaining SLD funding, TETN has always sought to comply with SLD requirements as described by Mr. Celentano. Mr. Celentano's call to inform TETN that it would receive full funding of its 2002-2003 request was a case of unusual information (reversal of partial funding and restoration of full funding based upon an undisclosed "appeal") from an SLD employee who was well known to TETN and whose decisions are important to TETN funding. It is reasonable, therefore, that TETN would comply with his repeated directions to "do nothing" while waiting for a new funding decision commitment letter. It is even more reasonable that TETN would follow such directions in a case where no SLD or Commission regulation provides other direction. It would have been an act of bad faith and bad judgment for TETN to directly disobey the directions of Mr. Celentano by filing its Form 486 or appealing the partial funding award on the basis of the May 5, 2003 FCDL.

It should be noted that some processes at SLD were underway without being communicated to TETN, making TETN reliance on Mr. Celentano even more reasonable. Mr. Celentano and the Funding Administrator both referred to an "appeal" that TETN never filed. If such an appeal were filed, it could only have been internal to SLD. And if the appeal had been pending at the time that Mr. Celentano called TETN, a subsequent appeal by TETN would have

been a confusingly anomalous second appeal in the same case. TETN is still mystified by the question of the appeal. Nevertheless, TETN's compliance with Mr. Celentano's direction allowed the phantom appeal process to move forward to the apparent result intended by SLD.

Further, when the "Appeal Funding Letter" was issued to TETN on September 12, 2003, the letter's direction to TETN was consistent with the pattern of action directed by Mr. Celentano and followed by TETN. The letter described itself as the "official Funding Commitment Decision Letter" and directed TETN to "use this updated information" in completing its Form 486. The letter made no reference to earlier awards or previous partial funding. TETN filed its Form 486 as directed, within the 120 day filing window.

2. If the Original FCDL Date is Determined to be the Correct Date for Purposes of the 120-Day Rule, Fair Treatment of TETN Requires Waiver of the 120-Day Rule

As the Commission pointed out in its decision in *Request for Review by Eastern Lebanon County School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-232946, CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 5477 (Wireline Com. Bur. 2003) ("*Eastern Lebanon Order*"),

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the commission may take into account considerations of hardship, equity, or effective implementation of overall policy on an individual basis.

Consistent with its oft-cited policy under the *Eastern Lebanon Order*, the Commission should waive the 120-day rule in this case even if it finds that the Funding Administrator was technically correct in marking the 120-day window from the date of the first funding letter. It is not within the public interest to ask SLD applicants to disregard specific instructions from SLD

employees in circumstances that are not addressed by SLD rules. In this case, to deny the full funding already approved by SLD would cause hardship for TETN and its E-rate users. As noted above, effective implementation of overall policy of SLD would not be advanced if SLD participants understood that they cannot rely on directions by SLD employees

Conclusion

TETN respectfully requests that the Commission:

- (1) Overrule the Administrator's determination that May 5, 2003 is the beginning of the 120-day period for filing Form 486 for Form 471 Application Number 330978; and
- (2) Order that the 120-day period for filing Form 486 for Form 471 Application Number 330978 began on September 12, 2003.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'G. M. Foote', written over a horizontal line.

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May 24, 2004

Attachments